Supreme Court, U.S.
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No. (1)

In The

Supreme Court of the United States

Mal Son Halliman and Robert W. Halliman
Petitioners

v.

The United States of America
Respondent

On Petition for Writ Of Certiorari to The United States Court of Appeals For the Sixth Circuit.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Supreme Court's ruling in *Celotex v. Catrett* justifies an interpretation, in a medical malpractice case, that at the end of discovery merely pointing out that the plaintiff has not produced an expert is sufficient trigger to shift the burden of proof to the plaintiff and prevail in a motion for summary judgment.

Whether summary judgment is appropriate when the movant's motion has not addressed all of the elements of the complaint.

Whether a patient's profound language barrier creates valid issues of fact regarding consent and informed consent .

Whether the court is justified in deciding an issue of fact in order to decide a procedural issue when the issue was not raised in the motion.

LIST OF PARTIES

In addition to the parties shown on the title page the following were parties to the original complaint but have since been dismissed as defendants without objection:

Lt.Col. Darwin Karr-Peterson, United States Army Retired

Blanchfield Army Community Hospital, Ft. Campbell, KY

United States Army

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit appears at Appendix A to the petition and is unpublished.

The opinion of the United States District Court, Middle District of Tennessee, Nashville Division appears at Appendix B to the petition and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals for the Sixth Circuit decided our case was December 7, 2007.

No petition for rehearing was timely filed in this case.

An extension of time to file the petition for a writ of certiorari was granted to and including May 5, 2008 on March 19, 2008 in Application No. 07A782.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provisions Involved:

Article XIV Section 1 of the constitution as quoted below:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statutory Provisions Involved

Tennessee Code Annotated § 29-26-115(a)(b) and (c) and TCA § 29-26-118 The statutes are shown in Appendix D:

STATEMENT OF THE CASE

The plaintiffs brought action against the United States, The United States Army, Blanchfield Army Community Hospital and Dr. Darwin Karr-Peterson for negligence in the performance of a colonoscopy during which the colon was punctured, for lack of consent, for lack of informed consent, and poor post-operative care. After a period of discovery, the defense moved for summary judgment on the grounds that the plaintiffs had not secured expert testimony. Plaintiffs responded requesting summary judgment be denied on the grounds that the movant had not met its burden of proof of undisputed fact sufficient to trigger the burden of proof to the plaintiffs, and that the movant had not addressed the issues of consent and informed consent in its motion. Magistrate Judge Bryant concluded that an issue of consent did not exist and that the defense had met its burden of proof consistent with *Celotex v. Cattret,* and recommended summary judgment be awarded to the defense. District Judge Todd Campbell accepted the recommendations of Judge Bryant and granted summary judgment for the defendant, the United States without additional comment. The case against The U.S. Army, Blanchfield Army Community Hospital and Dr. Karr-Peterson remain set for trial inasmuch as no motion to remove them as defendants was ever submitted. The U.S. Attorney has since moved to dismiss these as defendants and the plaintiffs did not oppose.

On April 4, 2007, Magistrate Judge Bryant filed a recommendation to remove the remaining defendants and dismiss the case. On April 23, 2007, District Judge Todd Campbell, filed the Order to

Dismiss the remaining defendants in the case and removed the case from the trial schedule. On April 24, 2007, Plaintiffs filled the Notice of Appeal to the District Court and on June 5, 2007, filled the Appellant Brief with the U.S. Court of Appeals, Sixth Circuit. On December 7, 2007, the U.S. Court of Appeals issued a ruling affirming summary judgment.

Statement of facts relative to issues presented.

The following facts have been stated in the complaint and have not been disputed or challenged by the defense:

1. Plaintiff, Mal Son Halliman is a Korean-born naturalized citizen who does not read or write English whatsoever.

2. Mrs. Halliman has good comprehension of every day basic spoken English but limited comprehension of rapidly spoken English or English language containing technical terminology or complex sentence structure.

3. The consent form that was presented to Mrs. Halliman for signature is written entirely in English and contains many words Mrs. Halliman does not encounter in her normal daily life.

4. Because of her inability to read English, Mrs. Halliman was not able to know and verify the contents of the consent form before signing it.

5. No interpreter was offered or provided to assist Mrs. Halliman in understanding the consent form.

6. Plaintiff's spouse, Robert Halliman was out of town in Louisiana and not present to assist his wife in understanding the consent form or understanding what the doctor was saying.

7. Mrs. Halliman did not want the colonoscopy. She had gone to the surgeon to get a hemorrhoid removed.

8. The doctor, Karr-Peterson, went to great lengths to convince Mrs. Halliman to agree to a colonscopy to the extent of calling Mr. Halliman in Louisiana in order to get Mr. Halliman to convince his wife to agree to the colonoscopy.

9. When Mrs. Halliman finally agreed to the colonoscopy, under pressure, she asked the doctor "who is going to do it?" and he said "I will if you don't mind." Mrs. Halliman did not grant consent to Karr-Peterson but said "I want the best person to do it." These statements were repeated at least two more times during the conversation but were not entered on the consent form.

10. On December 10, 1999, at 06:30am, Mrs. Halliman entered the Same Day Surgery Clinic of Blanchfield Army Community Hospital to have the colonoscopy.

11. In conversation with the intake nurse Mrs. Halliman inquired as to who was going to do the procedure. The intake nurse told Mrs. Halliman that a Dr. Little would be performing the colonoscopy. Mrs. Halliman then stated that she wanted the "best person " to do the procedure.

12. The nurse told Mrs. Halliman that Dr Little was the best person the hospital has because he was a board certified gastroenterologist who does these procedures routinely because of his specialty.

13. Mrs. Halliman, again, said that she wanted the "best person" to do the colonoscopy and the nurse, again affirmed that Dr. Little was the best in BACH for that procedure.

14. Mrs. Halliman was satisfied with the nurse's explanation and settled in to prepare for the procedure that she expected to be done by Dr. Little.

15. Mrs. Halliman was sedated prior to being taken to the procedure room and was not aware that Karr-Peterson was going to do the colonoscopy.

16. Dr. Karr-Peterson performed the colonoscopy during which he tore a hole in the colon necessitating emergency surgery to repair.

17. The instrumentality of the colonoscopy and the resulting puncture was totally in the

control of Dr. Karr-Peterson throughout the procedure.

18. This was Karr-Peterson's second colon puncture during colonoscopy during a six month period and the second puncture in 800 career colonoscopies.

19. Complications from infection during post-operative care required open-wound healing making for a lengthy and difficult recovery period.

REASONS FOR GRANTING THE WRIT

Motions for summary judgment are as commons as lawsuits themselves with FRCP Rule 56 being the foundation for the standard of review. The watershed cases of *Adickes v. Kress* and *Celotex v. Catrett* provided precedence for applying Rule 56, with *Adickes* viewed as having a more restrictive application and *Celotex* looked on as having reversed the restrictive view of Adickes almost eliminating the threshold at which the burden of proof in summary judgment shifts to the nonmovant. There still exists confusion over where that threshold is. Time has caused the threshold to evolve lower and lower to the point where, as in this case, filing a motion without any evidentiary matter automatically triggers the shift of burden of proof to the nonmovant. This is in contravention to the intent of FRCP Rule 56(c) and (e) and the rulings of Courts of Appeal of other Circuits. This case gives the court an opportunity to

realign the standard of review regarding the threshold that shifts the burden of proof to the nonmovant to be more consistent with the intent of Rule 56(c) and (e).

In the present case, the sole basis for the defense motion is that the plaintiff did not have expert testimony at the end of discovery. In other words, rather than present evidence from the record of an absence of disputed material fact, the defense merely said that the plaintiff would not be able to prove its case at trial without an expert. Cited, in support of this position, was the Tennessee statute, TCA § 29-26-115(a) and (b), as well as *Celotex v. Cattret.* The Court of Appeals erroneously upheld this as sufficient grounds to affirm the District Court ruling granting summary judgment to the defendant. The Court's decision is erroneous because it is inconsistent with the language and intent of FRCP Rule 56, inconsistent with the language of *Celotex v. Catrett*, inconsistent with rulings of U.S. Court of Appeals for the Eleventh Circuit, inconsistent with rulings of the U.S. Court of Appeals for the Fifth Circuit, inconsistent with rulings of the Tennessee Supreme Court regarding TCA § 2926-115 (a) and (b) and the requirement for expert testimony in medical malpractice cases, and inconsistent with the ruling of the Tennessee Supreme Court regarding the burden of proof in motions for summary judgment. In fact, the District Court, in the present case, acknowledged that if the burden-of-proof standard set by the Tennessee Supreme Court was applied, the motion for summary judgment would fail. The ruling of the Tennessee Supreme Court regard-

ing the movant's burden-of-proof is consistent with that of the U.S. Court of Appeals for the Eleventh Circuit *Clark v. Coats & Clark, Inc. 929 F. 2d at 608 (C.A. 11(Ga.), 1991),* and the Fifth Circuit. *Russ v. International Paper Co. 943 F. 2d 591 (C.A.5 (Miss.).* The District Court chose to disregard the Tennessee Court's standard on the grounds that it did not apply since this case was in Federal Court and did not consider the rulings of other Federal courts.

The issue of burden of proof

The movant and the court have concluded that showing the lack of expert testimony on the part of the plaintiff was sufficient to show undisputed material fact and warrant summary judgment. Used as the basis for their conclusion was the Supreme Court ruling in *Celotex v. Catrett, 477 U.S. 317, 322-23 (1986),* that has been widely misinterpreted as overruling the courts in *Adickes* by saying the movant does not have to affirmatively negate an essential element of the claim to get summary judgment but can merely assert that the non-movant has no evidence and thereby compel the non-movant to present its evidence *Russ v. International Paper Co. 943 F. 2d 591 (C.A.5 (Miss.). 1991); Clark v. Coats & Clark, Inc., 929 F. 2d 604 (11th Cir. 1991).*

The ruling in *Celotex* did not overrule *Adickes* but rather refined *Adickes* to a more specified set of circumstances. It still requires the movant to make a showing, from the record, sufficient to shift the

burden of proof to the non-movant. What the court really said was that the parties do not have to use affidavits to prove their issues in summary judgment if they can point to other parts of the record to make their case. Judge Cox, of the U.S. Court of Appeals for the Eleventh Circuit, in his very eloquent analysis of *Celotex* in *Clark v. Coats & Clark, Inc. 929 F. 2d at 608(C.A. 11(Ga.), 1991)* stated that

> "Even after Celotex it is never enough simply to state that the non-moving party cannot meet its burden at trial."

The differences in *Celotex*, that are not present in this case, is that in *Celotex*, the plaintiffs asserted that exposure to Celotex products was the source of the health problems of the plaintiff's spouse that led to his death. But, there was nothing in the record that established the facts of the exposure to the products, i.e. how the exposure occurred, the dates, times, places, and duration of exposure, etc. The defense also had presented interrogatories to the plaintiffs requesting the identity of any witness that could testify as to the exposure to Celotex products. The Plaintiffs in *Celotex* could not produce an answer to the interrogatories. Because *Federal Rules of Civil Procedure, Rule 56(c)* provides that citations to the record and answers to interrogatories can be used to show undisputed fact or disputed fact, the fact of a lack of adequate response to interrogatories and the fact that the record showed no facts establishing exposure to Celotex products, the movant was able to point out that the plaintiffs could not prove their case at trial on a fact

material to the case. It was not a "lack of evidence" as in a failure to produce affidavits or expert testimony, but it was a lack of evidence, as in a lack of facts in the record that established the when, where and how of the exposure to Celotex products and the plaintiff was not able to produce any factual evidence to show exposure. The movant in *Celotex v. Catrett* did not merely allege no evidence. It pointed to the absence of evidence of exposure in the record and cited the answer, or lack thereof, to interrogatories, thereby making a "showing" of undisputed material fact sufficient to shift the burden of proof to the plaintiff.

In the instant case the defendant has not submitted any interrogatories to which the Plaintiff should reply. The defense has not pointed to the record and shown that there are no facts in the record supporting the claim. The defense has not established from the record that this case is one that cannot be understood by a layperson without experts. The defense has not declared any witness or expert witness of its own that negates any claim of the Plaintiff. The defense has merely noted that the Plaintiff had not disclosed an expert by the deadline imposed by the court but failed to note that the plaintiffs have provided a witness list and requested documents. Given that the Plaintiffs have provided a witness list and requested documents, it can reasonably be assumed that the Plaintiffs have a strategy for producing testimonial and documentary evidence sufficient to influence a verdict in its favor in one or more of its elements of the complaint. And given that waiving the requirement for expert testimony is a legitimate option for the court, and given

that experts are not required if the facts can be understood by a lay person, it cannot be concluded that the plaintiffs are unable prove their case without experts. Moreover, the defense's failing in submitting interrogatories to the plaintiffs and failure of showing in the record that there is no dispute of material fact, demonstrates that it is unable to negate an essential element of the plaintiff's claim or to show that there is no dispute in material fact. In this it failed to make a "showing" sufficient to trigger the burden of proof to the Plaintiff.

In assessing whether the movant has met this burden, the courts should view the evidence and all factual inferences there from in the light most favorable to the party opposing the motion. *Adickes v. S. H. Kress & Co., 398 U.S. 144, 157, 90 S. Ct. 1598, 1608; Environmental Defense Fund v. Marsh, 651 F.2d 983, 991 (5th Cir. 1981).* All reasonable doubts about the facts should be resolved in favor of the non-movant. *Casey Enterprises v. Am. Hardware Mutual Ins. Co., 655 F.2d 598, 602 (5th Cir. 1981).* If the record presents factual issues, the court must not decide them; it must deny the motion and proceed to trial. *Environmental Defense Fund v. Marsh, 651 F.2d 983, 991 (5th Cir. 1981); Lighting Fixture & Elec. Supply Co. v. Continental Ins. Co., 420 F.2d 1211, 1213 (5th Cir. 1969).* Summary judgment may be inappropriate even where the parties agree on the basic facts, but disagree about the inferences that should be drawn from these facts. *Lighting Fixture & Elec. Supply Co. v. Continental Ins. Co., 420 F.2d at 1213.* If reasonable minds might differ on the inferences arising from undisputed facts, then the court should deny summary judgment. *Impossible Elec-*

tronic Techniques, Inc. v. Wackenhut Protective Systems, Inc., 669 F.2d at 1031; Croley v. Matson Navigation Co., 434 F.2d 73, 75 (5th Cir. 1970); Environmental Defense Fund v. Marsh, 651 F.2d 983, 991 (5th Cir. 1981); United States Steel Corp. v. Darby, 516 F.2d 961, 963 (5th Cir. 1975). The District Court and the U.S. Court of Appeals have not properly applied these standards of review. They did not view the evidence and factual inferences in the light most favorable to the nonmovant. They did not resolve reasonable doubts about the facts in favor of the nonmovant. And, they did not resolve differences of opinion on the implications of undisputed fact in favor of the nonmovant.

Celotex v. Catrett interpreted FRCP Rule 56 (c) and (e) quite correctly as not requiring the use of affidavits as evidence in making a "showing". However, the Advisory Committee notes to the 1963 amendment which added paragraph (e) was quite clear regarding the intent of Rule 56(c) and (e) and the burden of proof for the movant in summary judgment. In the last paragraph of the Advisory Committee notes it states

> **"where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidence matter is presented."**

Celotex upheld this standard because the defense was able to show from the record an absence

of facts material to the case. In the instant case, the defense has not presented any evidence of undisputed material fact that would shift the burden of proof to the non-movant.

The issue of expert testimony

The movant and the court have concluded that the absence of expert testimony at the end of discovery means that the plaintiff is unable to prove its case on an issue of material fact. Both cite *Tennessee Code Annotated § 29-26-115(b)* as requiring expert testimony in cases of medical malpractice. However, the requirement for expert testimony under *TCA § 29-26-115(b)* is not absolute. There are at least three other provisions in Tennessee law that will allow a malpractice case to move forward without experts. First, in the last sentence of *TCA § 29-26-115(b)*, it states that the court may waive the requirement for expert testimony when it is apparent that experts will not be available. There is no other language in the statute that would restrict the application of this provision. This provision legitimately allows the case to proceed with whatever evidence the parties can muster through witness and documentary evidence. The Magistrate Judge totally ignored this provision in the statute, as did the District Judge and the CA judges. Second, the law also provides that, in the absence of experts, the plaintiffs may be able to use a *res ipsa loquitur* approach.*Seavers v Oak Ridge Methodist Med. Ctr., 9 S.W.3d 86 (Tenn., 1999)*. Third, Tennessee courts have also ruled that malpractice cases can proceed without experts when the facts

material to the case can be understood and weighed by the lay person who would be the trier of fact *Seavers v Oak Ridge Methodist Med. Ctr., 9 S.W.3d 86 (Tenn., 1999);Bowman v. Henard, 547 S.W. 2d 527(Tenn.1977);Baldwin v. Knight, 569 S.W. 2d 450 (Tenn.1978).* Tennessee courts have also ruled that a theory of medical battery based on lack of consent does not require expert testimony because the question is simply one of did he or she consent or not.

Given these provisions in the code and case law, and given that the courts should view the evidence and all factual inferences there from in the light most favorable to the party opposing the motion, *Adickes v. S. H. Kress & Co., 398 U.S. 144, 157, 90 S. Ct. 1598, 1608; Environmental Defense Fund v. Marsh, 651 F.2d 983, 991 (5th Cir. 1981),* and given that the movant has not made a showing that the alleged malpractice, lack of informed consent and lack of consent are beyond the ability of the layperson to understand, it is therefore an error for the court to conclude that the non-movant cannot prove its case without an expert.

Summary judgment may be inappropriate even where the parties agree on the basic facts, but disagree about the inferences that should be drawn from these facts. *Lighting Fixture & Elec. Supply Co. v. Continental Ins. Co., 420 F.2d at 1213.* If reasonable minds might differ on the inferences arising from undisputed facts, then the court should deny summary judgment. *Impossible Electronic Techniques, Inc. v. Wackenhut Protective Systems, Inc., 669 F.2d at 1031 (C.A.5 (Fla.), 1982); Croley v. Mat-*

son Navigation Co., 434 F.2d 73, 75 (5th Cir. 1970); Environmental Defense Fund v. Marsh, 651 F.2d 983, 991 (5th Cir. 1981); United States Steel Corp. v. Darby, 516 F.2d 961, 963 (5th Cir. 1975).

In the instant case, that the plaintiffs had no expert at the end of discovery can lead to a number of widely differing and opposing conclusions. The defense conclusion is that the plaintiff would be unable to prove its case at trial. Another conclusion is that, given the time remaining until trial, it is possible that an expert could be forthcoming in that time. Another possible conclusion is that the plaintiffs could prove their case with a preponderance of evidence and a *res ipsa loquitur* approach. Another possible conclusion is that the plaintiffs could prove their case on factual issues within the common experience and knowledge of the layperson without the aid of experts using documentary and witness testimony. Because these are all within the realm of possibility, the defense's presumption, that its conclusion is the only conclusion that can be made from the facts, is faulty and therefore renders summary judgment inappropriate.

This is not unlike the court's ruling in *Adickes v. S. H. Kress & Co., 398 U.S. 144, 157, 90 S.Ct. 1598, 1608, (1970).* In *Adickes*, the plaintiff claimed that management or other employees in S.H. Kress had violated her civil rights by colluding with a police officer to drum up a reason to evict the plaintiff from the premises and have her arrested. Kress moved for summary judgment by saying there was no evidence of any collusion and supported it with some evidence that that management had not spoken

to a policeman and testimony from some that they did not see a policeman in the store. The district court granted summary judgment on these grounds and the court of appeals affirmed. The Supreme Court, however, reversed because Kress had not "foreclosed the possibility" of a policeman being in the store. In the instant case, the movant has not foreclosed the possibility of the plaintiff being able to prove its case without experts.

The plaintiffs have also presented an issue of simple consent. Expert testimony is not required for cases involving simple consent. *Blanchard v. Kellum, 975 S.W.2d 522, 524 (Tenn. 1998).* The issue of consent is clearly brought out in the complaint in paragraph 4, bullet 4. and the "background" paragraph of the attachment to the administrative claim, which was signed under penalty of perjury. Although the magistrate judge concluded that simple consent did not exist in the complaint, the fact of the plaintiff's inability to read and write English, the fact that the consent form was written in English, the fact of the plaintiff's limited comprehension of spoken English, the fact of usage of technical terms and complex sentences by Dr. Karr-Peterson, and the fact that the plaintiff said several times that she wanted the "best" person to do the procedure, could cause a reasonable person to conclude that an issue of simple consent exists. Again, If reasonable minds might differ on the inferences arising from undisputed facts, then the court should deny summary judgment. *Croley v. Matson Navigation Co., 434 F.2d 73, 75 (5th Cir. 1970); Environmental Defense Fund v. Marsh, 651 F.2d 983, 991 (5th Cir. 1981); United*

States Steel Corp. v. Darby, 516 F.2d 961, 963 (5th Cir. 1975)

The importance of language precision

Words mean things. A wrong word or an improperly used word can drastically change the meaning of a statute or ruling. For this reason legislators are quite careful in crafting the language used in the statutes they pass. Judges, likewise, are careful to craft the language used in their opinions, because they know that the opinion may be used as precedent in subsequent cases of similar nature. This is an opportunity for the Court to clarify the role and importance of the language used in a statute or court ruling in determining the meaning or intent of the statute or ruling.

In the present case, the Court of Appeals erred by making an interpretation and ruling on a Tennessee Supreme Court case that was inconsistent with the language used. The petitioner cited Blanchard v. Kellum as support for their consent claim and that simple consent cases do not require expert testimony. The Tennessee Supreme Court, in Blanchard v. Kellum presented a simple, two-question test to determine if a case was a medical battery theory based on a lack of simple consent, or one of informed consent. The relevant portion of the court's ruling is quoted below:

> We believe that there is a distinction between: (1) cases in which a doctor performs an unauthorized procedure; and (2) cases in which the procedure is au-

thorized but the patient claims that the doctor failed to inform the patient of any or all the risks inherent in the procedure. Performance of an unauthorized procedure constitutes a medical battery.

A simple inquiry can be used to determine whether a case constitutes a medical battery: (1) was the patient aware that the doctor was going to perform the procedure (i.e., did the patient know that the dentist was going to perform a root canal on a specified tooth or that the doctor was going to perform surgery on the specified knee?); and, if so (2) did the patient authorize performance of the procedure? A plaintiff's cause of action may be classified as a medical battery only when answers to either of the above questions are in the negative. If, however, answers to the above questions are affirmative and if the plaintiff is alleging that the doctor failed to inform of any or all risks or aspects associated with a procedure, the patient's cause of action rests on an informed consent theory.

Both, the District Court and the Court of Appeals interpret the language of *Blanchard v. Kellum* in test number one as referring only to the procedure and does not address the knowledge of the spe-

cific practitioner. Petitioners disagree with this interpretation. In law, language takes on great importance because of what is riding on the meaning of the language. The language structure is important here. In test one, the use of the definite article "the" is important. The definite article denotes specificity. If knowledge of a particular doctor was not intended in the meaning of the test then the indefinite article "a" would have been more appropriate with the read as "was the patient aware that a doctor would perform the procedure?" Or, no reference to doctor would have been made such as, "Was the patient aware that the procedure was going to be done?" However, the fact is that the test does use the term "the doctor" with all the specificity it implies.

If knowledge of the specific doctor was not the intent of the language of test one, then the remaining part of test one makes no sense in view of test two because an affirmative answer to test two automatically make the answer to test one affirmative. A negative answer to test two would make no sense if test one was affirmative, because why would someone not consent and then go into a hospital and subject themselves to the procedure?. It would not make sense for one to say that she did not know the procedure was going to be performed (test one) and then say she consented to it (test two.) However, a reading of the two tests as including specific knowledge of who the practitioner performing the procedure would be would allow differing answers to both tests and still retain logic. That test one is really focusing on the specific practitioner makes test two more sensible. One could then say in test two that consent was given to the procedure but in test one

say that consent was not given to that practitioner. Or, in test one, one could say "I knew the procedure was going to be done, but I did not know that doctor was going to do it." And in test two say, I consented to the procedure but did not consent to that doctor.

Factual issues v. procedural issues

Sometimes factual issues are so closely intertwined with procedural issues that deciding a procedural issue in summary judgment means deciding issues of fact. Since the standard of review is that judges should not decide issues of fact in summary judgment proceedings, what is the standard of review regarding the procedural issue v. the factual issue when they are so closely intertwined? This is an opportunity for the court to establish a standard of review regarding whether it is appropriate to decide a factual issue in order to move on a procedural issue.

The present case is one of those where the procedural intertwines with the factual. The plaintiffs pointed out that they had raised the issue of consent in the complaint and that the issue was not addressed in the motion for summary judgment. The procedural question is simply did the plaintiffs raise the consent issue in the complaint? and if so, did the movant address the issue in the motion? The factual issue is whether or not the plaintiff consented to the colonoscopy. A California Court of Appeals clearly stated that the adequacy of a written consent is a factual issue for a jury *Quintanilla v. Dunkelman. B171789 at 24(CA 9/12/2005)(CA,*

2005). In the present case, when the U.S. Court of Appeals ruled that the patient had consented to the procedure, it was deciding a factual issue in contravention to the standard of review. It erroneously decided the factual issue in order to make the ruling under the test of *Blanchard v. Kellum* that the plaintiff's case was informed consent rather than simple consent.

The issue of simple consent is stressed here for several reasons. One, it was brought out in the complaint. Two, it is an issue that does not require expert testimony under Tennessee Law. Three, it was not addressed in the motion for summary judgment. And four, the standard of review is that all of the essential elements of the complaint must be addressed in the motion for summary judgment or the motion will fail. Therefore, even if the nonmovant did not prevail on the other issues in the motion, the motion should have failed on this issue alone.

The role of Language Barriers in consent and informed consent

In a nation of a rapidly increasing immigrant population, language barriers are an ever present factor in relationships. This case is an opportunity to establish guidelines for determining the relevance of language barriers in issues of consent and informed consent and other issues where language barriers can have a profound effect. The importance of this issue at the national level is that often, citizens with language barriers are not afforded equal

protection under the law that our constitution guarantees.

For example, under Tennessee law a written consent presumes the person signing the consent has read and understood what he or she is signing. This is shown in the following quote from *Church v Perales, 39 S.W.3d 149 (Tenn. Ct. App., 2000)*

> As a general matter, the law presumes that persons who sign documents, having been given an opportunity to read them, are bound by their signatures. *Solomon v. First Tenn. Bank, 774 S.W.2d 935, 943 (Tenn. Ct. App. 1989).* This rule applies in medical battery and informed consent cases. Thus, the law presumes that patients ordinarily read and take whatever other measures are necessary to understand the nature, terms, and general meaning of consent forms involving medical treatment. *Karp v. Cooley, 349 F. Supp. 827, 835 (S.D. Tex. 1972); Grannum v. Berard, 422 P.2d 812, 815 (Wash. 1967).* This presumption has been codified in many states. See, e.g., *Parikh v. Cunningham, 493 So. 2d 999, 1001 (Fla. 1986); Cardio TVP Surgical Assocs. v. Gillis, 528 S.E.2d 785, 787 (Ga. 2000); Shahinaw v. Brown, 963 P.2d 1184, 1188 (Idaho 1998); Earl v. Ratliff, 998 S.W.2d 882, 891 (Tex. 1999).* Thus, the existence of a signed consent form gives rise to a presumption of consent in the absence of

proof of misrepresentation, inadequate disclosure, forgery, or lack of capacity.

Amendment XIV of the constitution guarantees citizens equal protection under the law. It is not an accurate or fair presumption to presume all of our naturalized citizens are able to read and write English or comprehend complex spoken language. The fact is that many are not. The statutes and law that presumes that persons, whose native language is not English, can read and understand that which is presented in English for signature, put these citizens at a disadvantage. Therefore, they are not being given the equal protection of the law.

The last sentence in the case law quoted above suggests that evidence of lack of capacity could annul a signed consent form. The concept of language barrier goes right to the issue of capacity. Capacity is defined as the ability to understand (Terry, Peter B, M.D. Informed Consent in Clinical Medicine, *Chest Journal, 131:563-568,* American College of Chest Physicians, 2007.)(Appendix D). When a patient has a language barrier sufficient to limit his or her understanding of what the practitioner is saying, and when the language barrier is such that the patient cannot read and understand what is written on a consent form he or she is asked to sign verifying that he or she has been informed, the capacity to consent or provide informed consent is severely limited rendering the consent

questionable at best. Such is the situation in the present case. The plaintiff brought out the issue of language barrier in the complaint, and addressed it in their response to the motion for summary judgment and in the brief to the appellate court. Yet, both the District Court and the U.S. Court of Appeals chose to ignore the roll of language barrier in the issues of consent and informed consent.

On the issue of informed consent, the normal burden of proof on the plaintiff at trial is to prove by expert testimony that the practitioner did not supply the appropriate information according to the standard of acceptable practice for that specialty and that medical community. TCA § 29-26-118. Again, the statute ignores the role of language barrier in capacity. If the case for lack of informed consent can be prosecuted on grounds of lack of capacity due to a language barrier, the need for expert testimony would not be necessary because the concept of language barriers are within the common knowledge of laypersons who would be triers of fact. *Seavers v Oak Ridge Methodist Med. Ctr., 9 S.W.3d 86 (Tenn., 1999).*

The issue of verbal conditions to consent

The final question the petitioners ask the court to review is whether verbal conditions to consent nullify consent if not met. In the present case it is fact that the plaintiff

told Dr. Karr-Peterson at least three times that she wanted the best person to do the colonoscopy. She verbalized this at least three more times to the intake nurse on the morning of the procedure. Petitioners have contended that Karr-Peterson did not have consent to perform the colonoscopy because he was not the best person, given an experienced, board-certified, gastroenterologist was available. This issue was brought out in the complaint but not addressed in the motion for summary judgment. It was brought out again in the plaintiff's response to the motion, their response to the recommendations of the magistrate judge, and in the brief to the appellate court. Neither the District Court or the U.S. Court of appeals addressed this issue. The only comment the defense has made is that it would require expert testimony to determine who the best person was. Plaintiff's disagree because comparing experience and qualifications and history of complications resulting from procedures is well within the ability of the lay person to understand. Petitioners have found no case law addressing the issue but feel it important, not only in this case but in cases of others similarly situated.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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